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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. BERTRAND PERRY, Defendant and Appellant.	A109104 (Solano County Super. Ct. No. VCR156267)

As part of an agreement to plead no contest to drug possession, defendant Bertrand Perry was placed on three years' probation conditioned, among other things, on completion of a residential drug treatment program. Two years later, the trial court revoked his probation after a contested hearing, finding that defendant had committed two misdemeanor offenses while on probation. The court sentenced him to serve the full three-year upper term for his original offense. On appeal, defendant contends that the trial court erred in: (1) finding there was sufficient evidence to violate his probation, (2) imposing the upper term sentence for the underlying offense, and (3) denying him custody credits for time spent in the residential drug treatment program. We affirm the judgment.

I. BACKGROUND

In 2002, defendant pleaded no contest to possession of morphine (Health & Saf. Code, § 11350, subd. (a)). In return for the plea, other charges and enhancements were dismissed, and defendant was promised consideration of probation and a two-year

sentence top. On May 24, 2002, defendant agreed to modify his plea bargain by stipulating to the imposition and suspension of a three-year upper term sentence in return for placement on three years' probation. A condition of probation was that defendant successfully complete a residential drug treatment program—the Victory Outreach program—for which he would receive "day-for-day credits" if he was later sent to prison for the drug offense. Under the plea agreement, if defendant failed to successfully complete the one-year program, he would violate his probation and receive no credits for time spent in the program.

On February 14, 2003, defendant advised the trial court that the Victory Outreach program objected to the medication regime that he was under and that he had moved to another residential program known as "Sea Mist Home." He asked the court to modify the terms of his probation to delete the requirement that he attend the Victory Outreach program, and allow him to continue in the Sea Mist Home program. The trial court agreed to defendant's proposed modification. Although not fully disclosed to the trial court at the time, it was later established that Sea Mist Home was a board and care facility, not a residential drug treatment program, and that it was operated by defendant's sister and staffed by family.

On August 13, 2003, defendant's probation was summarily revoked, apparently for failure to maintain contact with his probation officer, but he was reinstated on probation a few weeks later. On May 28, 2004, defendant's probation was again summarily revoked based on an incident that occurred in April 2004. At a contested probation revocation hearing in October 2004, evidence was presented that defendant violated his probation condition that he obey all laws by committing two misdemeanor offenses in August 2004—unlawful interference with a business (Pen. Code, § 602.1, subd. (a)) and giving false information to a police officer (Pen. Code, § 148.9).[1] [2]

[1] Penal Code section 602.1, subdivision (a) provides in relevant part as follows: "Any person who intentionally interferes with any lawful business or occupation . . . by obstructing or intimidating those attempting to carry on business, or their customers, and who refuses to leave the premises . . . after being requested to leave by the owner or the

The following is a summary of the relevant evidence presented at the probation revocation hearing:

Major Saber, the manager of a gas station in Vallejo, testified that defendant frequently came onto the gas station's property during the month of August 2004 to panhandle his customers. Saber saw defendant attempting to panhandle customers several times on August 24, 2004. Customers complained to Saber that defendant was trying to wash their windshields without their permission. Saber testified that he told defendant to leave the station many times, and that he did so "every day" he came onto the property. Despite Saber's demands, defendant would return the same day and engage in the same conduct.

Saber testified that he was present at the station on August 25, 2004, when his partner, Gina Peters, called the police, at Saber's request, to report defendant's conduct. He stated that one or more customers had complained, either to him or to Peters that day, about defendant trying to wash the customers' windshields.[3]

Vallejo Police Officer Robert Woulfe responded to Peters's complaint moments after it was received at 4:49 p.m. on August 25, 2004. He got a description of the perpetrator from Peters that included the perpetrator's race, gender, clothing, approximate age, height, and weight. Woulfe detained defendant around the corner, at a location that was between one-eighth and one-quarter of a mile from the station. Defendant was the only Black pedestrian Woulfe saw between the gas station and the location where defendant was detained. Although Woulfe could not recall any specifics of Peters's

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owner's agent . . . is guilty of a misdemeanor . . . ." Penal Code section 148.9, subdivision (a) makes it a misdemeanor for a person to falsely identify himself to a peace officer "upon [the person's] lawful detention or arrest."

[2] The prosecution also alleged a battery offense based on the April 2004 incident, but that allegation was not sustained by the trial court.

[3] Saber was not a native English-speaker. His responses were not always entirely clear, and he was unable to narrate with specificity the particular events that occurred on the day of defendant's arrest, as opposed to events on previous days in August in which defendant had been asked to leave the premises.

description at the time of the revocation hearing—other than that the suspect was a Black male—he testified that he did remember that defendant's clothing matched the description given to him by Peters. Upon being detained by Woulfe, defendant falsely identified himself to the officer as Mark Russell Dailey.

The trial court denied defendant's motion to suppress evidence of his giving a false name to an officer, sustained the allegations that defendant violated Penal Code sections 602.1, subdivision (a) and 148.9, and revoked defendant's probation for failure to obey all laws. On January 28, 2005, the court ordered that defendant's suspended three-year sentence be executed, and denied defendant's request for 170 days of custody credits for his time spent in the Victory Outreach program. This timely appeal followed.

II. DISCUSSION

Defendant contends that the trial court erred in: (1) finding there was sufficient evidence to violate his probation; (2) imposing the three-year, upper term sentence for his underlying offense; and (3) denying him credits for time spent in the Victory Outreach program.

A. Sufficiency of Probation Violation Evidence

In defendant's view, the offense of interfering with a business requires proof of three elements: (1) specific intent to interfere with the business, (2) obstruction or intimidation of the business's operators or customers, and (3) the perpetrator's refusal to leave upon being asked to do so. Defendant insists that no substantial evidence presented in this case supports any of these elements.

As an initial matter, we disagree that unlawful interference with a business is a specific intent crime. The operative requirement of Penal Code section 602.1 is that the offender must "intentionally interfere[] with [a] lawful business." This type of wording is characteristic of general, not specific, intent crimes. (See *People v. Alvarado* (2005) 125 Cal.App.4th 1179, 1188 ["The expressions 'willfully,' 'knowingly,' 'intentionally,' and 'maliciously' are expressions of general, not specific, intent when used in a penal statute"].) In this statute, the operative language proscribes the act of interference with a business, without regard to whether the offender intends to do some further act or to

achieve some additional effect or result. This distinction is critical: " ' "When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent." ' [Citations.] 'General criminal intent . . . requires no further mental state beyond willing commission of the act proscribed by law.' [Citation.]" (*In re Wasif M.* (2004) 119 Cal.App.4th 176, 181.) In our view, section 602.1 merely requires that the acts constituting the interference be intentional rather than inadvertent.

Although the statute further requires that the actor "obstruct[] or intimidat[e]" the business's operators or customers, this does not alter the intent element of the crime. The obstruction-or-intimidation language narrows the manner in which the business interference may come about and the range of intentional acts that come within the statute's scope. The wording carries no import that the actor must subjectively *intend* to obstruct or intimidate the operators or customers, as long as that is the objective effect of his intentional acts.

In any event, as defendant acknowledges, the characterization of the intent requirement as general or specific is less important in this case than determining whether substantial evidence supports the trial court's finding that he intentionally interfered with the gas station's business by acts that obstructed or intimidated its customers. In conducting our evidentiary review, we: (1) view the evidence in the light most favorable to the prosecution; (2) presume in support of the judgment the existence of every fact the trial court could reasonably deduce from the evidence, even if the evidence might in our opinion also be reconciled with a contrary finding; and (3) determine whether any rational trier of fact could have found the essential elements of the crime by a preponderance of the evidence. (See *People v. Catlin* (2001) 26 Cal.4th 81, 139 & cases cited therein.)

Here, the gas station manager testified that: (1) he saw defendant attempting to panhandle customers several times on the day before his arrest and on other days leading up to it; (2) customers complained to him that defendant was trying to wash their windows without permission; (3) he told defendant to leave the station many times, doing so every day when he saw him come onto the property; (4) defendant would always return later and engage in the same conduct, despite the manager's demands; and (5) he asked his partner to call the police on August 25th to report defendant's trespassing.

Viewing the evidence in the light most favorable to the prosecution, and presuming all facts in support of the judgment that may reasonably be drawn from the record, there is substantial evidence that defendant deliberately engaged in conduct that interfered with the business and obstructed the conduct of business by operators and customers alike. Defendant's intentional conduct in returning to the gas station again and again to engage in the same conduct for which he had been asked to leave, in itself, interfered with the business by obstructing the operators from carrying on the business and serving their customers. It may be inferred from the manager's testimony that ushering defendant off of the property was a daily, recurrent event for him and his partner in the days leading up to, and the day of, defendant's arrest, and that customer complaints and management discussions about defendant's visits and behavior regularly diverted the operators from the business activities they normally would have engaged in during the period preceding defendant's arrest. Although no customers testified, the station manager, at a minimum, personally observed defendant returning to panhandle customers after repeatedly being asked to leave the property. Regarding the customer complaints that defendant was attempting to wash their windshields without permission, there was no evidence that he ever denied these complaints or expressed surprise that he was unwelcome on the premises.[4] We may infer from the evidence that defendant did not deny the complaints, but left the premises when he was confronted about them, only to

[4] Defendant points out that evidence of customer complaints was not offered for their truth, but to explain the operators' ensuing conduct.

return later to engage in the same conduct. The fact that defendant gave Woulfe a false name reinforces the inference that he knew his conduct at the gas station was wrongful. Finally, contrary to defendant's suggestion, he was not constitutionally privileged to enter another person's business premises for the purpose of soliciting that business's customers for money and foisting unwanted services on them.

Defendant also maintains that since there was no testimony that he ever refused a demand to leave the property, he could not be prosecuted under Penal Code section 602.1. We decline to interpret the statute to allow a defendant to evade liability for unlawful business interference by the simple expedient of stepping off of the property each time he is asked and returning a short time later to resume the same conduct. Defendant's conduct of repeatedly reentering the property after being asked to leave, as testified to by the station manager, was in substance a refusal to leave.

Defendant further maintains that he could not be found to have falsely identified himself to a police officer for purposes of Penal Code section 148.9 because an essential element of that offense is that the false information be given while the defendant is being *lawfully* detained or arrested. According to defendant, the prosecution failed to offer sufficient proof that his detention on August 25, 2004 was lawful because: (1) there was no testimony regarding what Peters told Woulfe showing that he had reason to believe a crime had been committed, and (2) there was no evidence that defendant was detained based on a permissible description going beyond his race and gender.

As discussed earlier, Saber testified that Peters observed the same conduct and heard the same kinds of customer complaints about defendant's conduct that he had, and that they had discussed the information with each other. He testified that Peters called police at his request after defendant returned to the station and was again washing customer windshields without permission. Woulfe testified that he went to the station based on a trespassing complaint. From the testimony of Saber and Woulfe, we may infer that all of this information had been conveyed to the police by Peters—when she called them and when Woulfe interviewed her—before defendant was detained. The evidence was easily sufficient to meet the applicable lawful detention standard. (*People*

v. Souza (1994) 9 Cal.4th 224, 231 [detention is lawful if based on "specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity"].)

Defendant's further claim that Woulfe detained him based on an improper physical description is without merit. Although Woulfe could not recall the full physical description he obtained from Peters, he testified that it included the suspect's approximate age, height, and weight, in addition to his race, gender, and clothing. Woulfe recalled that defendant's clothing matched the description Peters gave to him even though he could not recall the elements of that description at the hearing. Further, Woulfe testified that defendant was the only Black male pedestrian in the vicinity, and that he first spotted defendant at a location very close to the station, within an hour after Peters's call to the police. The evidence does not support defendant's claim that Woulfe stopped him in sole reliance on his race and gender.

Whether framed as a sufficiency-of-the-evidence claim or a claim of error in the denial of his motion to suppress evidence, defendant's claim that he was unlawfully detained fails.

B. Sentencing Error

Defendant contends that the trial court erred under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) by imposing the upper term sentence of three-years in state prison based on its own findings of aggravating facts that were neither admitted by him nor found by a jury beyond a reasonable doubt. We reject defendant's argument on two counts.

First, *Blakely* does not apply retroactively upon revocation of probation to a sentence that was imposed but suspended prior to the decision. (*People v. Amons* (2005) 125 Cal.App.4th 855, 860.) Although defendant claims that his sentence was not actually imposed on May 24, 2002, the record does not support his position. The court stated specifically on the record that it was imposing sentence on that date, but suspending its execution. By colloquy in open court at the same hearing, defense counsel specifically advised defendant that under the modified plea bargain the court would send him to

prison for three years if he failed on probation. This was part and parcel of the agreement by which he was granted probation for the underlying offense. Although defendant finds asserted ambiguities elsewhere in the record, we believe the record is clear that a final sentence was imposed and suspended in 2002. *Blakely* has no application to the execution of such a sentence in 2005.

Second, even if sentence was actually imposed after *Blakely* was decided, as defendant claims, our Supreme Court has held that *Blakely* has no application to California's determinate sentencing law, or to the determination of facts used to choose an aggravated sentence term under that scheme. (*People v. Black* (2005) 35 Cal.4th 1238, 1246–1261.) Under the principles set down in *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, we are bound by that decision.

For these reasons, *Blakely* does not require the reversal of defendant's upper term sentence.[5]

C. Presentence Custody Credits

Defendant maintains that he is entitled to custody credits under Penal Code section 2900.5.[6] According to defendant, under his May 24, 2002 plea agreement, he only agreed to waive his statutory right to day-for-day credits for his time at the Victory Outreach program if he was terminated from the program for misconduct. Since he left the Victory Outreach program without negative incident due solely to their rules regarding his anti-psychotic drug regimen, defendant claims that the condition for his waiver of credits never came into effect.

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[5] We do not reach the People's further contention that *Blakely* is inapplicable because defendant was given the upper term sentence based solely on his recidivism.

[6] Penal Code section 2900.5 provides in relevant part as follows: "[W]hen the defendant has been in custody, including, but not limited to, any time spent in a . . . halfway house, rehabilitation facility, hospital, . . . or similar residential institution, all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, . . . shall be credited upon his or her term of imprisonment . . . ." Section 2900.5 includes time spent in a residential treatment facility as a condition of probation. (*People v. Thurman* (2005) 125 Cal.App.4th 1453, 1460.)

We disagree with defendant's interpretation of the plea agreement. It unambiguously required, as a condition of receiving credits for his stay at Victory Outreach, that defendant "successfully complete" the one-year program. Although defendant asserts that he did not knowingly and intelligently agree to waive these credits if he did not complete the program, and that successful completion of the program was an independent term of the probation unrelated to his waiver of credits, the record does not bear this out. In two colloquies that took place between defendant and his counsel in open court when he accepted the modified plea agreement, the granting of day-for-day credits was explicitly conditioned on successful completion of the program, and defendant affirmed that he understood this linkage.

In any event, the circumstances of defendant's departure from the Victory Outreach program amount, in our view, to a termination based on a violation of the program's rules. As defendant's counsel advised the court in February 2003, the Victory Outreach program "had a problem with him" and "didn't agree with his medication regime." That defendant opted to leave rather than be terminated does not change the fact that he chose to engage in a course of conduct that made his continued participation in the program impossible. The modification made to the conditions of his probation in February 2003 merely allowed defendant to continue on probation if he stayed in the Sea Mist Home. It did not relieve him of the waiver of credits that applied because of his decision to leave the Victory Outreach program. Even assuming that defendant could have earned relief from the waiver by transferring to another residential drug treatment program more to his liking, Sea Mist was not such a program, and did not even require defendant to maintain residence there on a consistent basis. Thus, defendant never met the agreed condition for relief from his waiver of credits.

The trial court did not err in denying defendant custody credit for his time spent in the Victory Outreach program.

III. DISPOSITION

The judgment is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Stein, J.